SUPREME COURT, U.S.
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NO. 91-1984

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CONTROVERSION OF QUESTIONS PRESENTED FOR REVIEW

Petitioner has set forth seven questions that it contends are presented for review by its petition for writ of certiorari. These seven questions are duplicitous. There really is only a single question presented for review:

> Whether the Eleventh Circuit's holding that the South Carolina Property and Casualty Insurance Guaranty Association ("SCIGA") is subject to personal jurisdiction in the State of Alabama for the claim submitted by Sherman Olivier that it is statutorily obligated to cover is consistent with the Due Process Clause of the Fourteenth Amendment?

TABLE OF CONTENTS

CONTROVERSION OF QUESTIONS PRESENTED FOR REVIEW . . . i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CITATIONS TO OPINIONS BELOW 1

CONTROVERSION OF STATEMENT OF THE GROUNDS FOR JURISDICTION . . . 2

CONTROVERSION OF CONSTITUTIONAL PROVISIONS INVOLVED . 3

STATEMENT OF THE CASE 4

A. Background facts 4

B. Statutory rules and regulations 12

SUMMARY OF ARGUMENT 18

ARGUMENT AND CITATION OF AUTHORITIES 20

I. THE ELEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES FEDERAL COURT . 20

II. THE ELEVENTH CIRCUIT'S HOLDING THAT SCIGA IS SUBJECT TO PERSONAL JURISDICTION IN ALABAMA FOR OLIVIER'S CLAIM IS CONSISTENT WITH THE DUE

PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 24

A. Minimum contacts . . . 25

B. Fair play and substantial justice 36

III. THE NUMEROUS ARGUMENTS SET FORTH BY SCIGA IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI ARE WITHOUT MERIT 40

CONCLUSION 51

TABLE OF AUTHORITIES

CASES — PAGE

Banholzer v. N.Y. Life Ins. Co., 178 U.S. 402 (1900) 50

Bell v. Senn Trucking Co. of Newberry, 418 S.E.2d 310 (S.C. 1992) 33-35, 42, 47

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 24, 40, 41

Deshotels v. SHRM Catering Services, Inc., 538 So. 2d 988 (La. 1989) 48

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 19, 24, 40, 41

Johnson v. N.Y. Life Ins. Co., 187 U.S. 491 (1908) 50

McGee v. International Life Insurance Company, 355 U.S. 220 (1957) . . . 45-46

Moffett v. Robbins, 81 F.2d 431, 437 (10th Cir. 1936) 50

Olivier v. Merritt Dredging Co., Inc., 954 F.2d 1553 (11th Cir. 1992) 10

Olivier v. Merritt Dredging Co., Inc., 979 F.2d 827 (11th Cir. 1992) 10, 19, 20, 26-33, 37-39, 44-45

Rhulen Agency, Inc. v. Alabama Insurance Guaranty Association, 715 F. Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2nd Cir. 1990) 18, 21-22

Sifers v. General Marine Catering Company, 892 F.2d 386 (5th Cir. 1990), aff'd in part and rev'd in part on other grounds, 897 F.2d 1288 (5th Cir. 1990) 48

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) . 24, 40, 41

STATUTES PAGE

28 U.S.C. §1254 2

S.C. Code Ann. §38-31-10 12

S.C. Code Ann. §38-31-20 . . . 14-15, 42

S.C. Code Ann. §38-31-40 12

S.C. Code Ann. §38-31-60 13-14

S.C. Code Ann. §38-31-100 15-16

CONSTITUTIONAL PROVISIONS PAGE

Amendment X,
United States Constitution 3

Amendment XIV, Sec. 1,
United States Constitution 3

Article IV, Sec. 1,
United States Constitution 3

Supreme Court Rule 10 2

CITATIONS TO OPINIONS BELOW

Respondent adopts the citations to opinions below set forth in petitioner's supplemental petition for writ of certiorari filed herein.

CONTROVERSION OF STATEMENT OF THE GROUNDS FOR JURISDICTION

Contrary to petitioner's assertion that jurisdiction of this court is based upon 28 U.S.C. §1254(1) and Supreme Court Rule 10, jurisdiction is based upon 28 U.S.C. §1254(1) only. Respondent's substantial disagreements with petitioner's arguments in favor of granting the writ are set forth hereinbelow in the argument portion of this brief.

CONTROVERSION OF CONSTITUTIONAL PROVISIONS INVOLVED

The only constitutional provision involved in this appeal is Amendment XIV, Sec. 1, to the United States Constitution. Contrary to petitioner's assertion, Article IV, Sec. 1 and Amendment X to the United States Constitution are not involved.

STATEMENT OF THE CASE

Petitioner's statement of the case is more of an argument than a fair statement of the case. Petitioner's statement of the case sets out facts in a very cursory and disjointed fashion, and blatantly omits certain background facts and statutory provisions which were critical to the Eleventh Circuit's decision. These pertinent facts and statutory provisions are set forth below:

A. Background facts.

On August 1, 1983, Sherman J. Olivier ("Olivier") sustained personal injuries while employed by Merritt Dredging Company, Inc. ("Merritt") as a seaman and a member of the crew of a vessel which was engaged

in dredging operations in the State of Alabama on the Alabama River. At the time of the incident, Olivier was a resident of the State of Louisiana, and Merritt was a South Carolina corporation having its principal place of business in South Carolina.

On July 31, 1984, Olivier filed an action against Merritt under the Jones Act and general maritime law in the United States District Court for the Southern District of Alabama, Southern Division. Olivier sought to recover for personal injuries he sustained as a result of his August 1, 1983 accident.

Subsequently, Merritt filed a bankruptcy petition pursuant to Chapter 11 in the United States Bankruptcy Court for the

District of South Carolina, and Olivier's action against Merritt was stayed. That stay was lifted on September 26, 1985 to allow this case to proceed to determine the liability of Merritt and to recover insurance proceeds in the event that judgment was entered against Merritt, as long as the bankruptcy estate was not unduly encumbered by defending the action. The order lifting the stay further provided that no execution of any judgment could be made against Merritt without further order of the bankruptcy court and that the order was not to be construed as allowing Olivier to better his position with regard to the bankruptcy estate.

At the time of the incident, Merritt had a workmen's compensation and employer's liability insurance policy with a marine

endorsement, which provided coverage for liability to members of the crew of a vessel. That policy was issued by Midland Insurance Company ("Midland") and was in full force and effect at the time of the incident. The policy limits of that policy were $500,000.00, and the total estimated annual premium was $86,541.00. The Midland policy insured risks and operations in the State of Alabama, and included within the annual premium was an estimated annual premium for Merritt's Alabama operations of $17,970.00.

On April 3, 1986, Midland was placed in liquidation pursuant to an order of liquidation entered by the Supreme Court of New York. Olivier's action was stayed because of the liquidation proceeding, but that stay was lifted subsequently on May

22, 1987. It is undisputed that the Midland policy would have afforded coverage for the claim asserted by Olivier had Midland not been liquidated.

On or about December 5, 1988, Olivier's personal injury claim against Merritt was tried before the United States District Court for the Southern District of Alabama, Southern Division. Merritt was represented at the trial by counsel which had been retained by the excess underwriters. At the conclusion of the trial, the jury awarded a verdict in favor of Olivier and against Merritt, and on February 14, 1989, a judgment in the amount of $522,190.00, plus interest, was entered in favor of Olivier and against Merritt. That judgment has been satisfied by the excess underwriters as to all amounts in excess of

$469,645.98, leaving the unpaid, underlying $469,645.98 portion of the judgment fully effective.

On July 21, 1989, the district court at the request of Olivier issued writs of garnishment to SCIGA, the Louisiana Insurance Guaranty Association ("LIGA"), and the Alabama Insurance Guaranty Association ("AIGA"), asserting that those guaranty associations are justly indebted to Olivier in the amount of $469,645.98, plus interest and costs.

LIGA and SCIGA moved the court to dismiss the garnishment action on several grounds, including that the court lacked personal jurisdiction over them. On December 21, 1990, the court issued an order dismissing the garnishment action as to

LIGA and SCIGA for lack of personal jurisdiction. On January 18, 1991, Olivier filed a timely appeal of the court's December 21, 1990 order.

On March 6, 1992, the United States Court of Appeals for the Eleventh Circuit reversed the district court's order, finding that the district court had personal jurisdiction over LIGA and SCIGA, and remanded the case to the district court for further proceedings. Olivier v. Merritt Dredging Co., Inc., 954 F.2d 1553 (11th Cir. 1992). Senior Circuit Judge Frank M. Johnson filed a dissenting opinion. On March 26, 1992, LIGA and SCIGA filed a suggestion of rehearing *en banc*. On December 21, 1992, the Eleventh Circuit Court of Appeals issued a new decision, Olivier v. Merritt Dredging Co., Inc., 979 F.2d 827

(11th Cir. 1992), in which it vacated and withdrew its March 6, 1992 decision, denied the suggestions for rehearing *en banc*, and issued a modified opinion. The Eleventh Circuit's December 21, 1992 modified opinion also held that the district court has personal jurisdiction over LIGA and SCIGA and reversed the district court's order and remanded the case for further proceedings. The modified opinion contained no dissent. Indeed, all judges on the panel concurred with the decision, and no judge on active service requested that the court be polled on rehearing *en banc*.

Petitioner seeks review by this Court of the Eleventh Circuit's December 21, 1992 decision.

B. Statutory rules and regulations.

SCIGA is a statutorily created association established, in part, to provide a mechanism for the payment of covered claims under certain types of insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer. S.C. Code Ann. §38-31-10, et seq. (Law. Co-op. 1976). SCIGA is funded by insurance companies, such as Midland, as a condition of their authority to transact business within the state. S.C. Code Ann. §38-31-40 (Law. Co-op. 1976). Prior to its liquidation in 1986, Midland was subject to assessment by SCIGA based upon premiums which would have included the premium paid on Merritt's policy and other similar

policies. S.C. Code Ann. §38-31-60 (Law. Co-op. 1976).

The South Carolina Property and Casualty Insurance Guaranty Association Act sets forth the rules and regulations governing the operation of SCIGA. Section 38-31-60 of that act sets forth the powers and duties of the SCIGA, and provides in pertinent part:

> The Association:
>
> (a) Is obligated to the extent of claims existing prior to the determination of insolvency and claims arising up to the earliest of the following dates:
>
> (i) thirty days after the determination of insolvency;
>
> (ii) the policy expiration date; or

(iii) the date the insured replaces or cancels the policy.

This obligation includes only the amount each covered claim is in excess of one hundred dollars and is less than three hundred thousand dollars. . . .

(b) Is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. [Emphasis added].

S.C. Code Ann. §38-31-60 (Law. Co-op. 1976).

A covered claim is defined in §38-31-20 of that act as follows:

"Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this chapter applies issued by an

> insurer, if the insurer is an insolvent insurer and (a) the claimant or insured is a resident of this state at the time of the insured event; or (b) the property from which the claim arises is permanently located in this state. . . . [Emphasis added].

S.C. Code Ann. §38-31-20 (Law. Co-op. 1976).

In the event a claimant has a claim against more than one state guaranty association arising out of the same incident, the statutory rules for SCIGA contain a "choice of guaranty association" provision:

> Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that, if it is a first-party claim for damage to property with a permanent location, he shall seek recovery first from the association of the

> location of the property, and, if it is a workers' compensation claim, he shall seek recovery first from the association of the residence of the claimant. Any recovery under this chapter must be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

S.C. Code Ann. §38-31-100(2) (Law. Co-op. 1976).

In light of the above provisions and similar provisions contained within LIGA's and AIGA's statutes, Olivier filed garnishment actions against SCIGA, LIGA and AIGA seeking to recover his outstanding judgment on the grounds that each is liable to him as a "claimant" to insurance proceeds owed by Midland on behalf of Merritt. Olivier asserts that the order of priority for payment of his judgment is SCIGA, LIGA and

AIGA. This petition does not involve the garnishments against LIGA and AIGA.

SUMMARY OF ARGUMENT

None of the issues identified in Supreme Court Rule 10 governing the grant or denial of writs of certiorari are at issue here. The case of Rhulen Agency, Inc. v. Alabama Insurance Guaranty Association, 715 F. Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2nd Cir. 1990), cited by petitioner as creating a conflict between the Courts of Appeal does not conflict with the decision below as the Second Circuit held that the district court should have dismissed the case for lack of subject matter jurisdiction, not for lack of personal jurisdiction, which is the issue in this case. Therefore, SCIGA's petition for writ of certiorari should be denied.

The Eleventh Circuit's decision in Olivier v. Merritt Dredging Co., Inc., 979 F.2d 827 (11th Cir. 1992), does not violate the Fourteenth Amendment due process rights of SCIGA. In holding that SCIGA was subject to personal jurisdiction in Alabama for Olivier's claim, the Eleventh Circuit properly applied the standards set forth by International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its progeny, and the standards required by the Due Process Clause of the Fourteenth Amendment. Accordingly, SCIGA's petition for writ of certiorari should be denied.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE ELEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES FEDERAL COURT.

Petitioner asserts that the Supreme Court should review the court of appeals decision in this case because there is a conflict or split between the federal circuits pertaining to the jurisdictional issue presented by petitioner's petition for writ of certiorari. That assertion is incorrect. There is no split or conflict between the federal circuits pertaining to the issue presented by petitioner's petition for writ of certiorari. The only federal circuit that has addressed the issue currently before this Court is the Eleventh Circuit in Olivier v. Merritt Dredging Company, Inc., 979 F.2d 827 (11th

Cir. 1992). The Olivier decision is well-reasoned and thoroughly supported. Each member of the panel that considered the case concurred in the decision, and no judge requested that the court be polled on petition for rehearing *en banc*.

Petitioner stated in its original and supplemental petitions for writ of certiorari that the Eleventh Circuit's decision in Olivier is inconsistent with the Second Circuit's decision in Rhulen Agency, Inc. v. Alabama Insurance Guaranty Association, 715 F. Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2nd Cir. 1990). That is incorrect. In Rhulen, the Second Circuit did not hold that the district court did not have personal jurisdiction over the various guaranty associations involved in that case, nor did it even

reach the personal jurisdiction issue. Rather, the Second Circuit affirmed the district court's dismissal of that action, holding that the district court lacked subject matter jurisdiction over the action. In Rhulen, an insurance agency with numerous customers residing throughout the country sued numerous state guaranty associations in New York. The agency had advanced payment of claims to its customers insured by Transit Insurance Company, and obtained assignments from the customer-insureds of their rights against Transit and the appropriate guaranty association. After the guaranty associations refused to reimburse the agency for the payment of claims, the agency filed suit in New York against the various guaranty associations. The district court dismissed the action for lack of personal jurisdiction. On appeal,

the Second Circuit affirmed the district court's dismissal of the action, but on the grounds that the court lacked subject matter (diversity) jurisdiction over the action. The Second Circuit did not reach the personal jurisdiction issue. Inasmuch as the district court lacked subject matter jurisdiction, its opinion as to personal jurisdiction is null and void.

Because the Eleventh Circuit's decision is not in conflict with the decisions of another United States Court of Appeals, and because petitioner has not set forth any other basis for jurisdiction under Supreme Court Rule 10, the petition for writ of certiorari should be denied.

II. THE ELEVENTH CIRCUIT'S HOLDING THAT SCIGA IS SUBJECT TO PERSONAL JURISDICTION IN ALABAMA FOR OLIVIER'S CLAIM IS CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

SCIGA's primary argument is that the Eleventh Circuit failed to apply the applicable standards set forth by this Court and required by the Fourteenth Amendment in holding that SCIGA was subject to personal jurisdiction in Alabama as to Olivier's claim. However, a careful reading of the Olivier decision demonstrates that the Eleventh Circuit carefully applied standards set forth by the Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945), World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), and Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Indeed, the Eleventh Circuit first made a minimum contacts analysis

applying the standards set forth in those cases, and then properly considered whether the assertion of personal jurisdiction over SCIGA would comport with fair play and substantial justice. The Eleventh Circuit's due process analysis was entirely consistent with the standards set forth by the Supreme Court and therefore SCIGA's petition for writ of certiorari should be denied.

A. Minimum contacts.

The Eleventh Circuit closely analyzed the history behind the creation of the guaranty associations, the language of the guaranty association statutes, and the facts surrounding Olivier's claim and correctly concluded that SCIGA purposefully availed itself of conducting activities in

Alabama so as to be subject to personal jurisdiction there.

In analyzing whether SCIGA had minimum contacts with the State of Alabama for purposes of Olivier's claim, the Eleventh Circuit found significant that state insurance guaranty associations, including SCIGA, were purposefully formed by members of the insurance industry to avoid federal legislation that would have created a federal guaranty fund. The Eleventh Circuit stated:

> ... Insurance guaranty associations were formed by members of the insurance industry to avoid federal legislation that would have created a federal guaranty fund.
>
> In 1966, Senator Thomas Dodd (D. Conn.) focused public attention on the problems created by a growing

number of insurance company insolvencies. He released a study on the insolvencies of substandard automobile insurance companies, and introduced Senate Bill 3919 (the 'Dodd Bill') to establish a Federal Motor Vehicle Insurance Guaranty Corporation. The Dodd Bill was designed to protect automobile insurance policyholders and claimants in a manner similar to the protection afforded bank depositors by the Federal Deposit Insurance Corporation. 112 Cong. Rec. 27311 (1966).

* * * * * *

The insurance industry had been historically opposed to the guaranty fund concept. In an effort, however, to avoid federal legislation and the intrusion of the federal government into regulation for solvency, the NAIC swiftly drafted and adopted a model post-insolvency assessment

fund bill (the 'Model Act') providing for individual state guaranty funds. The Model Act covered all insurance lines, except life, accident, health, title, credit and mortgage guaranty insurance. While the NAIC and virtually the entire property and casualty industry joined in advocating the passage of this defensive legislation, the American Insurance Association and the State Farm Companies did not initially lend their support for a state-by-state enactment of guaranty fund protection. The American Insurance Association, however, later helped draft the NAIC Model Act.

The Magnusson Bill [a substitution for the 'Dodd Bill'] died in the face of the NAIC Model Act, and variations of the Model Act were adopted in all states. Currently, post-insolvency assessment insurance guaranty funds

> for property and liability insurance exist in Puerto Rico, the Virgin Islands, the District of Columbia, and every state except New York (New York has had a form of preinsolvency assessment Insurance Guaranty Fund since 1947).

Olivier v. Merritt Dredging Company, Inc., 979 F.2d 827, 829-30 (11th Cir. 1992).

Also significant to the court's minimum contacts analysis was the purpose for which guaranty associations were created:

> The insurance guaranty fund law does not establish a special private corporation. Rather, an insurance guaranty fund is a public or quasi-public corporation. It is a legislatively declared "mechanism" to aid and benefit numerous citizens who have suffered losses due to the insolvency of their insurers. It fills a public need without profit to any organizers or stock-

> holders. The statutory purpose of the insurance guaranty fund law is to place claimants in the same position they would have been in if the insurer had not become insolvent.

Id. at 830.

In light of the history of, and purpose for, the state guaranty associations, the Eleventh Circuit properly concluded that the insurance industry had to have anticipated that the guaranty associations would be hailed into the same courts where their insolvent members would have been subject to the reach of due process, and rightly found that the guaranty associations consented to service of process in those foreign jurisdictions. Indeed, the Eleventh Circuit stated:

> In the instant case, LIGA and SCIGA are subject to legal liability in Alabama neither on account of random contacts nor on account of the unilateral activity of Midland Insurance. In forming the state insurance guaranty associations to avoid federal legislation creating a national guaranty fund, the insurance industry had to anticipate that the guaranty associations would be hailed into the same courts where their insolvent members would have been subject to the reach of due process. Thus, SCIGA and LIGA consented to service of process in Alabama in this case.

Id. at 833. Clearly, the court found the act of forming the state insurance guaranty associations to avoid federal legislation creating a national guaranty fund constituted a "purposeful availment" of its activities in foreign jurisdictions. The Eleventh Circuit also properly found that SCIGA consented to service of process in

Alabama, given the history of its creation.

In conducting its minimum contacts analysis, the Eleventh Circuit also properly found that the express language of the statute creating SCIGA demonstrates that SCIGA had fair warning that it could be subject to suit for "covered claims" in jurisdictions outside of their respective states.

> LIGA and SCIGA guaranteed payment of "covered claims." The "claimant," Olivier, was a Louisiana resident and he has a colorable claim. The "insured," Merritt, was a South Carolina corporation and it has a colorable claim. Not only did LIGA and SCIGA guarantee payment of "covered claims," but they also assumed all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. By the language of the statutes that govern LIGA and SCIGA, we conclude that these associations had fair warning that they could be subject to

> suit for covered claims in jurisdictions outside of their respective states.

Id.

The court also found significant that Midland was subject to personal jurisdiction in Alabama because it insured Merritt's operations there. Because SCIGA stands in the shoes of Midland by virtue of the express language of its statute, the Eleventh Circuit properly concluded that SCIGA consented to jurisdiction in the courts of Alabama. Id.

Significantly, the Eleventh Circuit's decision is bolstered by a decision rendered by the Supreme Court of South Carolina, the home state of SCIGA. In Bell v. Senn Trucking Co. of Newberry, 418 S.E.2d

310 (S.C. 1992), the Supreme Court of South Carolina addressed the identical issue and held that the Georgia Guaranty Association was subject to personal jurisdiction in the state of South Carolina. The following language is significant:

> The Georgia Pool first asserts that it is not amenable to suit in South Carolina under the South Carolina long-arm statute, S.C. Code Ann. §36-2-803 (1976). We disagree. South Carolina's long-arm statute provides that a court may exercise personal jurisdiction over a person who contracts to insure any person, property or risk located in South Carolina at the time of contracting. S. C. Code—Ann. §36-2-803(1)(f) (1976). Anglo-American [the insolvent insurance company] is subject to *in personam* jurisdiction in South Carolina because it contracted with Senn of Georgia to insure a risk in South Carolina. The Georgia legislature requires the Georgia Pool to assume the obligations of an insolvent insurer in regard to covered claims for a specified period following the date an insurer is determined to be in-

> solvent. Ga. Code Ann. §33-36-9 (1990). The Georgia Pool is "deemed to be the insurer for such period with respect [to] and to the extent of the claims with all the rights, duties, and obligations of the insolvent insurer...." Id. Moreover, as a condition of doing business in Georgia, an insurer is deemed to have appointed the Georgia Pool as its agent with respect to the investigation, adjustment, compromise, and settlement of covered claims in the event the insurer becomes insolvent. Id. §33-36-13.
>
> Based on the plain language of the Georgia Code, once Anglo-American became insolvent, the Georgia Pool became subject to the jurisdiction of the courts of this state as Anglo-American's alter-ego and agent. We find that the trial judge did not err in holding that the Georgia Pool is subject to *in personam* jurisdiction in South Carolina.

Id. at 833-34. After determining that the Georgia Pool was subject to personal jurisdiction in South Carolina, the South Carolina Supreme Court then proceeded to inter-

pret the Georgia Code to determine that the claims at issue were "covered claims" despite the contention to the contrary of the Georgia Pool that they were not covered by the Georgia Code.

It is very interesting, if not significant, that the law of South Carolina is totally contrary to the position taken by SCIGA in its petition. Certainly, if the Supreme Court of South Carolina is willing to hold that the Georgia guaranty association is subject to personal jurisdiction in South Carolina, it only follows that the Supreme Court of South Carolina also would hold that SCIGA would be subject to personal jurisdiction in Alabama for Olivier's claim.

B. Fair play and substantial justice.

In holding that SCIGA was subject to personal jurisdiction in Alabama for Olivier's claim, the Eleventh Circuit also properly and thoroughly addressed whether the assertion of personal jurisdiction over it would comport with fair play and substantial justice.

Contrary to SCIGA's assertion, the Eleventh Circuit properly found that it would not be burdensome on SCIGA to defend suits in other jurisdictions. The court stated:

> We conclude that the associations' obligations to defend suits in other jurisdictions would not be unduly burdensome. Indeed, both LIGA and SCIGA may alleviate the cost of litigation in other jurisdictions by adjusting their insurance assessments. Or if the expenses are too great, they have the option of altering

> their obligations and coverage for claims.
>
> * * *
>
> In addition, as the Supreme Court of the United States has noted: "... modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity." The Supreme Court subsequently stated that the historical developments noted in McGee have only accelerated in the generation since that case was decided. Requiring adjudication in Alabama will not impose a substantial burden on LIGA and SCIGA.

Id. at 834.

By contrast, the Eleventh Circuit found that requiring Olivier to seek coverage for his claim from LIGA in a Louisiana court and from SCIGA in a South Carolina court would be unduly burdensome and a waste of judicial resources, and also would

frustrate the purpose of the guaranty association statutes. As stated by the Eleventh Circuit:

> It would be unduly burdensome, however, to require Olivier to seek coverage for his claim from LIGA in Louisiana courts and from SCIGA in South Carolina courts. Such requirement would spread thin his resources and would hamper Olivier's ability to obtain quick, convenient and effective relief. Indeed, it would frustrate the very purposes of the state insurance guaranty associations. Furthermore, a requirement that Olivier sue in both Louisiana and South Carolina would pose an unnecessary waste of precious judicial resources. Separate litigations do not necessarily ensure fairness; in this case they would inhibit it.

Id.

In sum, the Eleventh Circuit strictly and properly complied with the standards set forth by the Supreme Court and required

by the Due Process Clause of the Fourteenth Amendment in holding that SCIGA is subject to personal jurisdiction in Alabama for Olivier's claim. The Eleventh Circuit carefully and thoughtfully applied the standards set forth in International Shoe, World-Wide Volkswagen and Burger King. SCIGA's assertion that the Eleventh Circuit failed to apply the appropriate due process analysis is totally incorrect.

III. THE NUMEROUS ARGUMENTS SET FORTH BY SCIGA IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI ARE WITHOUT MERIT.

SCIGA's primary argument in support of its petition for writ of certiorari is that SCIGA's due process rights have been violated by the Eleventh Circuit's holding that it is subject to personal jurisdiction in Alabama for Olivier's claim. Section II

of this brief has demonstrated that the Eleventh Circuit strictly and properly applied the standards set forth by the Supreme Court in International Shoe, World-Wide Volkswagen and Burger King, and also required by the Fourteenth Amendment in holding that the LIGA and SCIGA are subject to personal jurisdiction in Alabama for Olivier's claim. In addition to its primary argument, SCIGA also asserts several stream-of-conscious, tangential arguments in support of its assertion that its petition for writ of certiorari should be granted. Those arguments are either mere repetition of the primary argument or red herrings, and they can be dealt with briefly.

First, SCIGA asserts that the South Carolina statute does not guarantee insur-

ance obligations in Alabama. That is an incorrect statement. The statute creating SCIGA provides that SCIGA shall be deemed the insurer in the event of the insolvency of the insurance company for covered claims, which includes a claim against an "insured" of South Carolina. S.C. Code Ann. §38-31-20. There is absolutely no geographical limitation inserted in that provision or any other provision of the South Carolina statute. Certainly, the statute should be deemed to contemplate SCIGA guaranteeing the obligations of an insurer in a situation such as this involving a claim against the insured South Carolina corporation arising out of an incident occurring in Alabama. In Bell v. Senn Trucking Co. of Newberry, 418 S.E.2d 310 (S.C. 1992), the Supreme Court of South Carolina held that the Georgia Insurance

Insolvency Pool covered claims arising out of accident in South Carolina, which holding is directly analogous to the decision below.

Second, SCIGA asserts that the only connection involving the state of Alabama is that Olivier's injury occurred in Alabama. Again, that is an incorrect statement. Merritt, a South Carolina corporation, was operating in Alabama. Merritt was insured for its Alabama operations by Midland, and after Midland went into liquidation, SCIGA guaranteed Midland's contractual obligations to insure Merritt's Alabama operations. Furthermore, the Merritt insurance policy issued by Midland included an estimated annual premium of $17,970.00 for Merritt's Alabama operations. Undeniably any assessments paid by Midland to

SCIGA were based, in part, upon premiums paid by Merritt to Midland for Merritt's Alabama operations. Accordingly, SCIGA received a pecuniary benefit as a direct result of guaranteeing Midland's contract to insure Merritt's Alabama operations.

Third, SCIGA argues that there is no language in the statute indicating an intention to be sued outside the state of South Carolina and that SCIGA has not consented to be subject to suit in a foreign jurisdiction. The Eleventh Circuit addressed this precise argument, and properly found that it bordered on the specious. As stated by the Eleventh Circuit:

> We think this argument borders on the specious. The intent of the legislature had to be to protect their citizens as either policyholders or victims of the insolvency of an insurance compa-

> ny. It must be remembered that this issue has arisen not because Merritt became insolvent but because Midland Insurance Company became insolvent. If Merritt had remained solvent, it would have had to pay the judgment but for the existence of the guaranty associations. The South Carolina legislature intended to protect its citizens (such as Merritt) who were policyholders from such losses. In reaching our conclusion in this case, we disregard the bankruptcy of Merritt.

Olivier, 979 F.2d 832, n. 7. Significantly, the court found that the history surrounding the creation of the guaranty associations and the express language of the guaranty acts demonstrated that SCIGA consented to suit in foreign jurisdictions for covered claims.

Fourth, SCIGA repeatedly asserts that the Eleventh Circuit improperly relied upon McGee v. International Life Insurance

Company, 355 U.S. 220 (1957). The Eleventh Circuit did in fact correctly rely on McGee for the proposition that a company with insurance obligations in a state in which it has no other business has submitted to the jurisdiction of the state's courts. The Eleventh Circuit then properly relied upon the language from statutes creating the SCIGA to find that that association stands in Midland's shoes and therefore is subject to personal jurisdiction to the same extent as Midland would have been had it not become insolvent. That analysis was totally proper.

Fifth, SCIGA asserts that the Eleventh Circuit's ruling is improper because it will allow an Alabama court to determine the substantive issue of whether Olivier's claim is a covered claim and other substan-

tive issues related to the South Carolina guaranty statute. That argument is totally spurious. Under choice of law rules, courts in one state frequently apply the substantive law of another state. That is not unusual or improper. Furthermore, SCIGA's argument that the substantive and procedural issues pertaining to SCIGA should be decided by the Supreme Court of South Carolina, and no other court, is totally contrary to the Supreme Court of South Carolina's analogous decision in Bell v. Senn Trucking Company of Newberry, 418 S.E.2d 310 (S.C. 1992).

Sixth, SCIGA suggests that Olivier's claim is not a "covered claim." The limited law available on this issue provides that the judgment Olivier seeks to enforce arises out of a "covered claim" within the

meaning of the South Carolina Guaranty Act. Deshotels v. SHRM Catering Services, Inc., 538 So. 2d 988 (La. 1989); Sifers v. General Marine Catering Company, 892 F.2d 386 (5th Cir. 1990), aff'd in part and rev'd in part on other grounds, 897 F.2d 1288 (5th Cir. 1990). At the very least, and as noted by the Eleventh Circuit, Olivier has a "colorable claim" which supports a finding of personal jurisdiction.

Seventh, SCIGA asserts that the effect of the Eleventh Circuit's decision will be severe on all state guaranty associations. As pointed out earlier, the Eleventh Circuit addressed this precise issue and found that its holding would not be unduly burdensome on state guaranty associations.

Eighth, SCIGA argues that the Eleventh Circuit's interpretation of the South Carolina guaranty act was a violation of the Tenth Amendment because SCIGA's amenability to suit outside South Carolina is a matter reserved to the state, absent express delegation to the United States by the Constitution. That argument is frivolous for two reasons. First, the Tenth Amendment is not applicable here because federal courts have pendent jurisdiction over state law issues when, as here, jurisdiction is found in admiralty and maritime jurisdiction. Second, assuming the Tenth Amendment is applicable, the history of the creation of the guaranty associations and the express language of the South Carolina Guaranty Act demonstrate that SCIGA consented to suit in foreign jurisdictions.

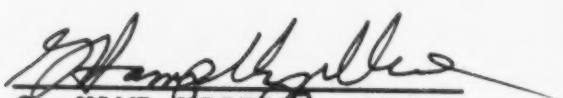
Finally, SCIGA argues that the Eleventh Circuit's decision was a violation of the full faith and credit clause or principles of comity. The United States Supreme Court has long held that full faith and credit is not denied to the statute of another state where the court of another state or the federal court does not deny the statute's validity, but only construes it. Banholzer v. N.Y. Life Ins. Co., 178 U.S. 402 (1900). See also Johnson v. N.Y. Life Ins. Co., 187 U.S. 491 (1908). This principle holds true even if the construction is later determined to be wrong. Moffett v. Robbins, 81 F.2d 431, 437 (10th Cir. 1936). In the case at bar, the Eleventh Circuit was construing the statute at issue, not questioning its validity. Thus, the Eleventh Circuit's act of interpreting

the statute did not violate the full faith and credit clause or principles of comity.

CONCLUSION

SCIGA's petition for writ of certiorari should be denied.

Respectfully submitted,



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